Harper v Canada (2004) – Third Party Election Advertising limits in Federal Election Campaigns

The *Canada Elections Act* limits advertising spending by third party individuals and groups during a federal election campaign. According to section 350 of the *Canada Elections Act*, third parties are limited to spending a maximum of $3,000 in each electoral district or up to a total of $150,000 nationally.[1] A third party is defined as a person or a group, other than a political candidate, registered political party or constituency association. So for example, if a member of the public wanted to advertise through the radio about a particular political position (e.g. protecting the environment), that person or group would only be able to spend up to $3000 in one district or up to $150,000.00 nationally.

If you're thinking that the name Harper sounds familiar, you are on the right track. Stephen Harper, when he was President of the National Citizens Coalition, first filed a constitutional challenge to the legislation in 2000. Mr. Harper thought that the spending limits in the *Elections Act* were an infringement of his right to free expression because they limited the amount that he, or any third party, could spend on election advertising.[2] It is presumed that limits on election advertising expenditures breach the freedom of expression because they restrict the manner and scope in which one can engage in political speech.[3] By the time the case reached the Supreme Court of Canada in 2004, Mr. Harper was the newly elected leader of the Conservative Party of Canada. He became Prime Minister of Canada in 2006.

The *Harper v Canada* case was the first time the Supreme Court ruled on the constitutionality of third party advertising limits established by Parliament.[4] The major issue before the Court in *Harper* was whether third party spending provisions in section 350 of the *Canada Elections Act* violated section 2(b), freedom of expression rights in the *Canadian Charter of Rights and Freedoms.*

The Supreme Court decided that limiting spending by third parties during federal election campaigns did violate our guaranteed freedom of expression rights. However, they then had to consider whether that violation was reasonable and justifiable, given the arguments in favour of the spending limits which were presented by the Government.

In a split 6-3 decision, Justice Bastarache, writing for the majority of the Supreme Court upheld the constitutionality of third party advertising limits. While he determined that third party advertising limits infringed section 2(b), freedom of expression rights guaranteed by the *Charter*, he ruled that they were justified under the balancing rights provision, section 1 of the *Charter*.

***Harper* in the Alberta courts**

At trial, the Alberta Court of Queen's Bench found that the spending limits infringed section 2(b) of the*Charter* and could not be justified under section 1. The trial court declared section 350 invalid because of its vagueness. The trial court also determined that the Government had not provided enough evidence to show that the spending limits were reasonable. The Government appealed the case to the Alberta Court of Appeal. The Alberta Court of Appeal agreed with the trial decision and dismissed the appeal.[5] The Government then appealed the case to the Supreme Court of Canada.

Is the freedom of expression infringed?

Writing for the majority of the Supreme Court, Justice Bastarache recognized that the limits on election advertising expenses infringe freedom of expression rights in the *Charter*.[6] According to Justice Bastarache, most third party election advertising is political expression and therefore is at the core of the guarantee of free expression.[7]

Section 2 (b) expression rights infringed but can the Government justify the legislation?

1) Why should advertising limits exist in the first place?

Drawing from the *Libman v Quebec (Attorney General)* case in 1997, which considered the constitutionality of spending limits in referenda, Justice Bastarache pointed out that the Court previously endorsed spending limits as essential means of promoting fairness.[8] These limits are necessary to prevent the most affluent citizens from monopolizing election discourse and, consequently, depriving their opponents of a reasonable opportunity to express themselves.[9]

Justice Bastarache emphasized that the Supreme Court's understanding of electoral fairness is consistent with Parliament's egalitarian election model. Based on the premise that individuals should have an equal opportunity to participate in elections, the model promotes fairness by preventing the wealthy from controlling the electoral process. Justice Bastarache pointed out that third party spending limits "seek to create a level playing field for those who wish to engage in electoral discourse."[10]
Justice Bastarache noted that the lower courts failed to follow Supreme Court guidelines as set out in the*Libman* case and did not defer to Parliament's choice of an election model in determining the constitutionality of third party advertising limits.[11]

2) The Section 1 Test: Are the advertising limits justified?
When the Court determines that a *Charter* right has been infringed, it can then consider arguments by the Government that justify that infringement. In order to help the Court to determine whether the legislation, in this case the legislation limiting advertising spending by third parties, is a reasonable limit, it uses a 'test'. This is also known as the section 1 test. The test contains the following parts:

Step 1 - Pressing and substantial objective: Does the legislation have a pressing and

substantial objective?

Step 2 - Proportionality: Are the means used to achieve the legislative objectives proportionate in that they do not breach *Charter* rights more than necessary? The Court uses the following steps to answer this proportionality question:

a) Rational Connection: Is there a rational connection between the legislation that is in violation of the*Charter* and the objectives of the legislation itself? In other words, are the means rationally connected to the objectives?
b) Minimal Impairment: Does the infringement minimally impair *Charter* rights?
c) Proportionate Effect: Do the benefits of the legislation outweigh the harms associated with violating the*Charter* right?

Step 1 - Does the legislation have a pressing and substantial objective?
The first step in the section 1 analysis is to identify the objectives of the legislation and determine whether they are "pressing and substantial" - that is, they must be important enough to justify overriding *Charter*rights.[12]

In this case, the Supreme Court agreed with the government's characterization of the legislation's objectives:

- to promote equality in political discourse by preventing those with greater means from dominating the electoral debate;
- to protect the integrity of the financing regime applicable to candidates and parties, and
- to ensure that voters have confidence in the electoral process.[13]

Justice Bastarache remarked that the Government did not need to provide evidence of actual harm to demonstrate that each objective was pressing and substantial. In this case, the Government provided enough evidence of the importance of electoral regulation.[14]

Step 2 - Proportionality: Are the means proportionate to achieve the legislative objectives?

The second step of the section 1 test is to consider whether the means used to achieve the legislative objectives are proportionate in that they do not breach *Charter* rights more than necessary. This step contains sub-parts, which assist the court in coming to its determination. The court must ask:

- whether there was a rational connection between the legislation and its objectives;
- whether the legislation minimally impairs the Charter protected right;
- whether the benefits of the legislation are proportional to the harms effected by the violation of the Charter right.

Rational Connection

At the rational connection stage of the inquiry, the Court has to determine whether there was a rational connection between the infringing measure and the pressing and substantial objectives it was meant to serve.

The Supreme Court agreed that there was a rational connection between third party advertising limits and the government's objectives found at Step 1 of the analysis.[15]

Minimal Impairment

At the minimal impairment stage of the inquiry, the Court must assess whether the legislation infringes the right to free expression in a way that is measured and carefully tailored to the legislation's goals. The impairment must be minimal and the law must be carefully tailored so that rights are impaired no more than necessary.[16]

Justice Bastarache found that section 350 passed the minimal impairment inquiry. He pointed out that the Court should defer to the balance that Parliament has struck between political expression and meaningful participation in the electoral process.[17] Section 350 also minimally impairs the right to freedom of expression.[18] The limit allows for meaningful participation in the electoral process while respecting freedom of expression.[19]

According to Justice Bastarache, the provisions still allow third parties to advertise in a limited way through expensive forms of media like television, newspaper and radio. They also allow third parties to engage in a significant amount of low cost advertising such as leaflets and 1-800 numbers. Justice Bastarache agreed with the trial judge's conclusion that the limits allow for modest national information campaigns and reasonable electoral district informational campaigns.[20]

Proportionate Effect

The last stage of the proportionality test involves weighing the benefits of the legislation with the harms of the legislation.

Justice Bastarache upheld section 350 because the benefits of the legislation outweigh the harms that it effects. The section has several positive effects. They include enhancing equality in political discourse, promoting expression of poorer people, and promoting fairness in the electoral system. While section 350 has the harmful effect of not allowing third parties to engage in unlimited political expression, the benefits of the restrictions outweigh those harms.[21]

The Minority Opinion

While the members of the Court agreed that the advertising limits infringed freedom of expression, they did not agree on whether this infringement was justified under the section

1 test. The Court agreed on the government's objectives and found a rational connection, but a minority of three justices had a different interpretation of the minimal impairment and proportionate effect inquiries.

Writing for the minority, Chief Justice McLachlin and Justice Major agreed that the legislation infringed the freedom of expression. They wrote that this limiting legislation prevents citizens from effectively communicating their views. They considered this a serious incursion on freedom of expression in the political realm.[22] They were of the view that freedom of expression includes the right to attempt to persuade through "peaceful interchange."[23] Spending limits impede citizens from effectively communicating through the national media and mail. Instead, citizens are confined to minor local dissemination of their views. The result is that registered political parties and their candidates have the exclusive right to express ideas during an election.[24]

Chief Justice McLachlin and Justice Major also found that section 350 does not satisfy the minimal impairment inquiry. They noted that the limitations in the section are severe: they prevent citizens from effectively communicating with their fellow citizens on election issues. Any communication beyond the local level is effectively rendered impossible. Financial limits imposed on citizens' right to express themselves through advertising amount to a virtual ban on their participation in political debate during the election period. The only space left in the "marketplace of ideas" is for political parties and candidates.[25]

The minority also questioned the need for such "draconian" limits to prevent the dangers of inequality, an uninformed electorate and a public perception that the system is unfair.[26] While the Chief Justice and Justice Major pointed out that election spending limits are permissible in some circumstances to ensure fairness and faith in the electoral process, the problem with the legislation is the "draconian nature of the infringement."[27]

Chief Justice McLachlin and Justice Major, writing for the minority, stressed that the harmful effects of the legislation outweigh the benefits. The possible benefits conferred by the law are illusory because of the unproven and speculative nature of the dangers of the limits. They also pointed out that the infringement of freedom of expression is serious – it denies citizens the right of effective political communication. This is especially serious because political expression is at the heart of the guarantee of the freedom of expression – it underpins democracy. The measures may actually cause more inequality, less civic engagement, and greater disrepute.[28]

According to the minority opinion, the spending limits do not allow citizens to exercise free political speech. The minority found that the limits have a "chilling effect" on political speech, forcing individuals to choose between not expressing themselves at all or having their voice reduced to a whisper.[29] Not only do spending limits constrain the right of a few citizens to speak – they constrain the political speech of all Canadians, rich or poor.[30]

---

[1] *Harper v Canada*, [2004] 1 SCR 827, 2004 SCC 33 at para 3 ;

Canada Elections Act, SC 2000, c 9.

[2] *Harper v Canada*, 2001 ABQB 558 at paras 27, 31.

[3] *Ibid* at paras 62, 156.

[4] *Harper, supra* note 1 at para 59.

[5] *Ibid* at paras 51-52.

[6] *Ibid* at para 147.

[7] *Ibid* at para 66.

[8] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 .

[9] *Harper, supra* note 1 at para 61.

[10] *Ibid* at paras 62-63.

[11] *Ibid* at para 64.

[12] *Ibid* at para 25.

[13] *Ibid* at paras 23, 93.

[14] *Ibid* at para 93.

[15] *Ibid* at paras 28-30, 104, 107-109.

[16] *Ibid* at para 32.

[17] *Ibid* at para 111.

[18] *Ibid* at para 114.

[19] *Ibid* at para 115.

[20] *Ibid.*

[21] *Ibid* at paras 120-121.

[22] *Ibid* at para 9.

[23] *Ibid* at para 1.

[24] *Ibid* at para 7.

[25] *Ibid* at para 35.

[26] *Ibid* at para 38.

[27] *Ibid* at para 39.

[28] *Ibid* at para 41.

[29] *Ibid* at para 42.

[30] *Ibid* at para 43.